

Letter of Findings Number: 04-20110619
Sales/Use Tax
For Tax Years 2008, 2009, and 2010

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ISSUE

I. Sales Tax – Imposition – Exempt Sales.

Authority: IC § 6-2.5-1-5; IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-8.1-5-1; Indiana Dep't. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); [45 IAC 2.2-8-12](#); Sales Tax Information Bulletin 21 (May 2002).

Taxpayer protests the Department's proposed assessments on certain sales, claiming some of its customers were exempt from sales tax.

STATEMENT OF FACTS

Taxpayer is an Indiana company which provides pest control services and lawn care. In 2011, the Indiana Department of Revenue ("Department") conducted a sales/use tax audit for 2008 through 2010 tax years. Pursuant to the audit, the Department determined that Taxpayer did not collect and remit sales tax on "turf maintenance contracts." The Department's audit also determined that Taxpayer did not pay sales tax or self assess and remit use tax on certain purchases of tangible personal property, which Taxpayer used for its business. Additionally, the audit determined that Taxpayer was allowed some credits for sales tax which it mistakenly paid at the time of its purchases.

Taxpayer only protested the assessment on "turf maintenance contracts." An administrative hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales Tax – Imposition – Exempt Sales.

DISCUSSION

The Department's audit determined that Taxpayer failed to collect sales tax on "turf maintenance contracts," which are taxable retail transactions. Taxpayer argued that it was not responsible for collecting sales tax on sales to customers who were exempt from sales tax. Thus, Taxpayer believes that the Department's assessments were overstated.

As a threshold issue, all tax assessments are prima facie evidence that the Department's assessment of tax is presumed correct. "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." IC § 6-8.1-5-1(c); Indiana Dep't. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012).

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). A person who acquires property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b).

IC § 6-2.5-2-1 provides:

- (a) An excise tax, known as the **state gross retail tax**, is imposed **on retail transactions made in Indiana**.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. **The retail merchant shall collect the tax as agent for the state. (Emphasis added).**

IC § 6-2.5-4-1, in relevant part, provides:

- (a) A person is a retail merchant making a retail transaction when he engages in selling at retail.
- (b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:
 - (1) acquires tangible personal property for the purpose of resale; and
 - (2) transfers that property to another person for consideration.

...

(e) The gross retail income received from selling at retail is only taxable under this article to the extent that the income represents:

- (1) the price of the property transferred, without the rendition of any service; and
- (2) except as provided in subsection (g), any bona fide charges which are made for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other service performed in respect to the property transferred before its transfer and which are separately stated on the transferor's records.

For purposes of this subsection, a transfer is considered to have occurred after delivery of the property to the purchaser.

IC § 6-2.5-1-5(a) states:

Except as provided in subsection (b), "gross retail income" means the total amount of consideration, including cash, credit, property, and services, for which tangible personal property is sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for:

- (1) the seller's cost of the property sold;
- (2) the cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller;
- (3) charges by the seller for any services necessary to complete the sale, other than delivery and installation charges;
- (4) delivery charges; or
- (5) consideration received by the seller from a third party if:
 - (A) the seller actually receives consideration from a party other than the purchaser and the consideration is directly related to a price reduction or discount on the sale;
 - (B) the seller has an obligation to pass the price reduction or discount through to the purchaser;
 - (C) the amount of the consideration attributable to the sale is fixed and determinable by the seller at the time of the sale of the item to the purchaser; and
 - (D) the price reduction or discount is identified as a third party price reduction or discount on the invoice received by the purchaser or on a coupon, certificate, or other documentation presented by the purchaser.

For purposes of subdivision (4), delivery charges are charges by the seller for preparation and delivery of the property to a location designated by the purchaser of property, including but not limited to transportation, shipping, postage, handling, crating, and packing.

The Department's Sales Tax Information Bulletin 21 (May 2002), 25 Ind. Reg 3939 ("Information Bulletin 21") addressing issues concerning "Lawn Care Applications," states, in relevant part, that:

Sales by a Lawn Care Company

The relationship between a lawn care company and its customer is contractual. The customer agrees to pay a set price and the company agrees to apply the necessary chemicals to a lawn for its proper care and maintenance. The chemical cannot be purchased separately from the company and applied by the customer. A unitary transaction is the purchase of tangible personal property and services under a single agreement for which a total combined charge is calculated. A retail unitary transaction is a unitary transaction that is also a retail transaction. A retail transaction means a transaction that constitutes selling at retail. A lawn care application is a retail transaction because the lawn care company acquires tangible personal property (chemicals) and transfers them to its customers for consideration in the ordinary course of its regularly conducted business.

The sales tax is imposed on the gross retail income received in a retail unitary transaction. The gross retail income received includes the price of the property transferred plus any bona fide charges made for preparation, fabrication, alteration, modification, finishing, completing, delivery, or other service performed in respect to the property before its transfer. Because the chemicals are not transferred until they are applied to the lawn, the application charges are included in the company's gross retail income. Therefore, the entire contract price is subject to the Indiana sales tax. **(Emphasis in original).**

Additionally, [45 IAC 2.2-8-12](#), in relevant part, provides:

- (b) Retail merchants are required to collect the sales and use tax on each sale which constitutes a retail transaction unless the merchant can establish that the item purchased will be used by the purchaser for an exempt purpose.
- (c) All retail sales of tangible personal property for delivery in the state of Indiana shall be presumed to be subject to sales or use tax until the contrary is established. The burden of proof is on the buyer and also on the seller unless the seller receives an exemption certificate.
- (d) Unless the seller receives a properly completed exemption certificate the merchant must prove that sales tax was collected and remitted to the state or that the purchaser actually used the item for an exempt purpose. It is, therefore, very important to the seller to obtain an exemption certificate in order to avoid the necessity for such proof. The mere filing of a Registered Retail Merchant Certificate number is not sufficient to relieve the seller of the responsibility to collect the sales tax or prove exempt use by the buyer.
- (e) No exemption certificates are required for sales in interstate commerce, however, proper records must be maintained to substantiate such sales.
- (f) An exemption certificate issued by a purchaser shall not be valid unless it is executed in the prescribed and approved form and unless all information requested on such form is completed.
- (g) An exemption certificate or other evidence supporting an exempt sale must be maintained by the seller for at least three (3) years after the due date of the tax return upon which such exempt transaction is reported.
- (h) Exemption certificates may be reproduced provided no change is made in the wording or content.

In this instance, the Department's audit noted that Taxpayer offers "lawn care applications" to its customers, which are taxable unitary retail transactions outlined in Information Bulletin 21. Taxpayer thus is a retail merchant

and should have collected and remitted the sales tax on its sales of "lawn care applications." Taxpayer did not do so. Nor did Taxpayer provide the exemption certificates, which it collected from its customers, to the Department's auditor during the audit. The auditor was therefore unable to verify whether certain sales were exempt from the sales tax.

Pursuant to [45 IAC 2.2-8-12\(b\)](#), "Retail merchants are required to collect sales and use tax on each sale which constitutes a retail transaction unless the merchant can establish that the item purchased will be used for an exempt purpose." [45 IAC 2.2-8-12\(d\)](#) also cautions that, "Unless the seller receives a properly completed exemption certificate the merchant must prove that sales tax was collected and remitted to the state or that the purchaser actually used the item for an exempt purpose. It is, therefore, very important for the seller to obtain an exemption certificate in order to avoid the necessity for such proof." In the absence of the properly signed and executed exemption certificates, the Department's audit properly assessed sales tax on the otherwise taxable sales.

Claiming that some of its customers were exempt from sales tax, Taxpayer believed that the Department's assessments were overstated. At the hearing, Taxpayer presented several copies of signed exemption certificates, but did not provide the necessary source documentation. Taxpayer was allowed additional time to submit the necessary source documentation to support its protest by April 27, 2012.

There is no question that Taxpayer entered into retail transactions for which – absent an exemption – Taxpayer was required to collect sales tax. Subsequent to the hearing, Taxpayer supplied exemption certificates from its customers for certain of its sales. The Department, Audit Division, is requested to review the late-filed exemption certificates and to make whatever adjustments it deems appropriate.

Additionally, as to the following sales, Taxpayer's documentation, on its face, failed to demonstrate that those sales, for which it claimed were exempt, indeed matched its customers' claimed exempt purchases. Thus, the Department is not able to agree that Taxpayer has met its burden of proof demonstrating that the sales at issue were exempt. Taxpayer remains liable for the sales tax due on the following transactions.

Inv. Date	Inv. Nos.	Customer	Amount
03/27/2008	58415	XXXXXX Automotive	\$ 25.00
05/06/2008	61331	XXXXXX Automotive	\$ 25.00
07/02/2008	62790	XXXXXX Automotive	\$ 25.00
09/02/2008	65267	XXXXXX Automotive	\$ 25.00
10/29/2008	67123	XXXXXX Automotive	\$ 25.00
04/24/2008	1849	XXXXXX Power & Light	\$ 5,600.00
04/04/2008	61150	XXXXXX Closures	\$ 245.00
05/05/2008	61757	XXXXXX Closures	\$ 1,400.00
07/07/2008	62869	XXXXXX Closures	\$ 450.00
07/19/2008	2527	XXXXXX Closures	\$ 500.00
09/05/2008	65121	XXXXXX Closures	\$ 245.00
11/07/2008	66998	XXXXXX Closures	\$ 245.00
02/27/2009	60947	XXXXXX Automotive	\$ 25.00
04/17/2009	71338	XXXXXX Automotive	\$ 25.00
07/06/2009	12611	XXXXXX Automotive	\$ 25.00
08/25/2009	14145	XXXXXX Automotive	\$ 25.00
10/06/2009	16088	XXXXXX Automotive	\$ 25.00
05/08/2009	15680	XXXXXX Power & Light	\$ 3,400.00
06/13/2009	71226	XXXXXX Closures	\$ 245.00
07/30/2009	12747	XXXXXX Closures	\$ 450.00
09/11/2009	14634	XXXXXX Closures	\$ 245.00
10/07/2009	14767	XXXXXX Closures	\$ 1,000.00
03/12/2010	18414	XXXXXX Automotive	\$ 25.00
04/22/2010	19974	XXXXXX Automotive	\$ 25.00
07/06/2010	21856	XXXXXX Automotive	\$ 25.00
10/20/2010	23330	XXXXXX Automotive	\$ 25.00
11/09/2010	25273	XXXXXX Automotive	\$ 25.00
04/09/2010	11449	XXXXXX Power & Light	\$ 2,900.00
04/15/2010	10206	XXXXXX Closures	\$ 1,400.00
05/04/2010	20306	XXXXXX Closures	\$ 245.00
08/02/2010	21975	XXXXXX Closures	\$ 450.00
10/20/2010	23759	XXXXXX Closures	\$ 245.00

Taxpayer is reminded that sales tax becomes due at the time of the transaction; either the purchaser is exempt at the time of the transaction or it is not exempt. If the purchaser claims an exemption, the exemption certificate should be obtained at the time the transaction occurs otherwise the burden of proving the transaction was exempt becomes measurably more difficult.

FINDING

Taxpayer's protest is sustained in part and denied in part subject to the results of the Department's supplemental audit review.

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